

**Matter of Jewish Press, Inc. v Kingsborough
Community Coll.**

2021 NY Slip Op 31874(U)

June 2, 2021

Supreme Court, New York County

Docket Number: 159039/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

In re Application

THE JEWISH PRESS, INC.,

INDEX NO. 159039/2019

Petitioner,

MOTION DATE
MOTION SEQ. NO. 1, 2, 3
MOTION CAL. NO.

for a Judgment under Article 78 of the
Civil Practice Law and Rules,

DECISION AND ORDER

-against-

KINGSBOROUGH COMMUNITY COLLEGE and
THE CITY UNIVERSITY OF NEW YORK,

Respondents.

The following papers, numbered 1 to ____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

|

Answer — Affidavits — Exhibits _____

|

Replying Affidavits

|

Cross-Motion: Yes X No

Under Motion Sequence 1, Petitioner The Jewish Press, Inc. (“Petitioner”) commenced this proceeding pursuant to Article 78, of the Civil Practice Law and Rules (“CPLR”), the New York Public Officers Law §89 (“POL”) et seq. (the “Freedom of Information Law” or “FOIL”), and CPLR § 3001 for a judgment vacating, overruling and prohibiting the enforcement of the final administrative decision dated May 24, 2019; directing Respondents Kingsborough Community College (“KCC”) and The City University of New York (“CUNY”) (collectively, “Respondents”) to provide Petitioner with access to all denied documents; and awarding Petitioner its costs and attorneys’ fees pursuant to POL § 89(4)(c). Respondents filed an answer.

The proceeding arose from Petitioner’s FOIL demand that requested the following categories of documents:

- (i) All records pertaining to Complaints by employees regarding anti-Semitism or anti-Zionism, made to either the school itself, the EEOC, New York City human rights commission, or the New York State division of human rights. These records shall include but not be limited to, the actual complaint [,] any investigation, findings, and determination’s [sic] (“FOIL Request 1”);
- (ii) All records pertaining to Complaints by students regarding anti-Semitism or anti-Zionism, made to either the school itself, the EEOC,

New York City Human Rights Commission, or the New York State Division of Human Rights. These records shall include but not be limited to, the actual complaint [,] any investigation, findings and determination's [sic] ("FOIL Request 2"); and

(iii) All records pertaining to religious accommodation requests either by employees or students. These rockers [sic] shall include but not be limited to the actual request and any findings or determinations ("FOIL Request 3").

By email dated May 9, 2019, KCC's Record Access Officer ("RAO") Julie Block-Rosen denied the FOIL request. CUNY denied Request 1, stating, "The College has no substantiated complaints regarding anti-Semitism or anti-Zionism filed by employees. To the extent that you request information on unsubstantiated complaints, the request is denied under § 87(2)(g) of the New York State Public Officers Law since that information is not final agency policy or determinations." CUNY denied FOIL Requests 2 and 3 under POL § 87(2)(a) which excludes information that is specifically exempted from disclosure by state or federal statute. CUNY asserted that the material requested contained student information that is protected under the Federal Family Education Rights and Privacy Act ("FERPA") and that disclosure would constitute an unwarranted invasion of privacy under POL § 87(2)(b). Further, CUNY stated that there were no reasonable means to retrieve the information sought by FOIL Request 3.

On May 9, 2019, Petitioner appealed the RAO's denial to the "Records Appeal Officer." Petitioner claimed, *inter alia*, that the statute specifically excluded "statistical or factual tabulations of data" and therefore the information responsive to their FOIL requests should be supplied. Petitioner also claimed that any personal information that would be in violation of FERPA could be redacted. In response to Respondents' claimed burden of locating records, Petitioner referred to POL § 89(3)(a), which states that a request cannot be denied because it is burdensome or voluminous.

On May 24, 2019, CUNY's FOIL Appeals Officer, who is also CUNY's Interim General Counsel and Senior Vice Chancellor for Legal Affairs, denied Petitioner's appeal with respect to FOIL Requests 2 and 3.

As for Request 1, CUNY distinguished the request for complaints made to external agencies such as the SHDR, and complaints made to the college, or internal complaints. CUNY affirmed the denial of disclosure as to the complaints made to external agencies, asserting that disclosure would interfere with ongoing investigations. As to internal complaints, CUNY remanded the determination to the RAO, with instructions to disclose "responsive records related to open matters with redactions," by June 24, 2019. CUNY wrote, "The FOIL statute excludes from exemption 'statistical or factual tabulation or data' and the Court of Appeal has determined that 'a witness statement'" such as a complaint constitutes "factual data insofar as it embodies a factual account of the witness's observations."

In May 2019, KCC "engaged the law firm Jackson Lewis, P.C. to investigate these internal claims of discrimination concerning facts similar to those under investigation by the SDHR." Respondents state that KCC "provided Jackson Lewis with all documents it had collected in connection with its initial, unfinished investigation of the incidents, including materials related to the

SDHR investigation.” KCC “was investigating whether any policies were violated, and subsequently Jackson Lewis is seeking to determine if any employees violated CUNY/KCC policies, or federal, state, or local laws.” KCC states that “Jackson Lewis’s investigation is ongoing.” KCC further states, “Based on the outcome of Jackson Lewis’s investigation, it is possible that KCC employees would face disciplinary action.”

On June 24, 2019, KCC’s RAO produced 127 pages of documents “pertaining to complaints that were deemed to be unsubstantiated” in redacted form, and withheld the remainder claiming attorney-client privilege. KCC’s RAO withheld documents pertaining to ongoing matters, explaining that the release of this information “could have a prejudicial impact on [the] pending investigations, and therefore, the disclosure of such records would be inconsistent with public policy, which supports the rights of the parties to a fair and impartial investigation.” Specifically, KCC’s RAO “withheld records related to a pending employee complaint to the New York State Division of Human Rights (‘SDHR’) that was, at the time, under investigation by the SDHR” and “records relating to an ongoing internal investigation of anti-Semitism.”

On June 26, 2019, Petitioner appealed the June 24, 2019 decision. Petitioner claimed, “Foil (sic) does not exempt records merely because they are ‘unsubstantiated’ or because they relate to an ongoing matter, unless that matter is judicial in nature and is demonstrably prejudiced by release of said records” and that “[n]either factors are present here.”

By letter dated July 10, 2019, CUNY denied the appeal, asserting that the RAO appropriately redacted the 127 pages of documents “pertaining to unsubstantiated employee complaints filed by the College” on personal privacy grounds, and properly withheld those responsive documents pertaining to open, ongoing investigations. As for the latter, CUNY explained:

As explained by the College to this Office, the disclosure of information related to an open investigation could impede the investigative process by, among other things, the noncooperation of witnesses and tailored testimony. Even more, disclosure of such information could have a chilling effect on the willingness of witnesses and victims to report such conduct in the future. Thus, in the College’s view, the disclosure of such information during the pendency of an investigation does not serve the public interest of ensuring that the College conducts a fair and impartial investigation. The College made its determination by conducting the balancing test on a case-by-case basis. The Office believes that the College’s proffered rationale was reasonable under the circumstances.

On July 31, 2019, SDHR determined that there was no evidence that CUNY engaged in religious discrimination, and found there was “no probable cause” in the matter than had been commenced by Mr. Goldstein. Mr. Goldstein did not appeal the No Probable cause Determination.

On September 17, 2019, Petitioner filed the instant Article 78 proceeding to compel disclosure of the requested documents, to the extent they remain improperly undisclosed or redacted. Respondents filed their Verified Answer on December 6, 2019.

By Order dated June 22, 2020, as to FOIL Request 1, this Court ordered Respondents to produce the employee complaints that were subject to the internal investigation by KCC in redacted form and to produce the requested records as they related to Mr. Goldstein's SDHR matter. The Court noted that Mr. Goldstein's SDHR matter had been concluded. As to FOIL Request 2, Respondents were ordered to compile responsive documents and a log identifying the personal identifying information ("PII") of students for an *in camera* inspection. As to FOIL Request 3, the Court deemed Respondents' response to be sufficient. Lastly, Petitioner's application for attorneys' fees was denied.

On June 22, 2020, under Motion Sequence 2, Petitioner filed a "Motion to Renew and Reargue" on June 22, 2020, in which Petitioner moved for leave to reargue the Court's denial of fees and costs, and moved for leave to renew with respect to the Court's denial of FOIL Request 3. The motion was marked fully submitted on March 1, 2021 (along with the subsequently filed Motion Sequence 3 which is discussed below).

Under cover letter dated September 23, 2020, Respondents e-mailed the Court with copies of unredacted documents bearing Bates stamp numbers KCC_0001 to KCC_0129 for *in camera* review. Respondents described the documents submitted as "two student complaints of antisemitism, the investigation of these complaints, and the determination and recommendation of the Office of Equal Opportunity and Diversity Management (OEO) (one complaint was substantiated, the other was unsubstantiated)."

By letter dated October 1, 2020, Respondents' counsel informed the Court that "Respondents have mistakenly produced certain documents to Petitioner, and request that the Court order Petitioner to destroy all copies and notes taken of the mistakenly produced documents." Respondents' counsel stated that "on Friday, September 18, 2020, the assistant to KCC's Records Access Officer emailed the documents responsive to FOIL Request No. 2, with redactions for personally identifying information, directly to Sara Greenwald at the Jewish Press." Petitioner took the position that Respondents waived the claimed FOIL exemption in their production to Petitioner.

After oral argument, by Decision and Order dated October 5, 2020, this Court held that Respondents' production of the redacted records to Petitioner rendered moot that portion of this Court's June 22, 2020 Order which directed Respondents to compile documents in response to FOIL Request 2.

On October 19, 2020, Petitioner and Respondents e-filed a Stipulation and Order wherein the parties stipulated and agreed that Petitioner's motion for leave to Reargue with respect to fees and costs would be changed *nunc pro tunc* to a motion for leave to Renew and Reargue with respect to fees and costs. Further, the Stipulation and Order provided that Petitioner's Motion to Renew and Reargue would be supplemented *nunc pro tunc* to include the following facts, which occurred after the filing of the motion:

- a. Pursuant to the June 22 Decision, on August 26, 2020 Respondents provided The Jewish Press with 102 pages of records relating to employee complaints of anti-Semitism at KCC, which included redactions of personally identifying information.

- b. On September 18, 2020, Respondent (sic) provided The Jewish Press with 127 pages of records relating to student complaints of anti-Semitism at KCC, which included redactions of personally identifying information.
- c. Pursuant to the June 22 Decision, on September 18, 2020, Respondents provided The Jewish Press with 100 pages of records relating to complaints of anti-Semitism at KCC made to the New York State Division of Human Rights, which included redactions of personally identifying information.

Under Motion Sequence 3, Petitioner filed a motion for an order directing compliance with this Court's June 22, 2020 Order. The motion was fully submitted on March 1, 2021.

Motion Sequence 2

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (internal citations omitted). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted." *Id.*

"A motion to renew may be granted where a party presents "new facts not offered on the prior motion[s] that would change the prior determination[s]," or demonstrates that "there has been a change in the law that would change the prior determination[s]." *Terrani v. Tourneau, LLC*, 2019 WL 2648073 at *1 (Sup Ct, New York County 2019) (internal citations omitted).

Motion to Renew FOIL Request 3

Petitioner argues that "[t]he Court's denial of the third request for records was in... error because under the Second Department's ruling in *Matter of Jewish Press v. New York City Department of Education*, 2020 WL 2462318 (2d Dept 2020) ["the Second Department case"], the request should have been approved." As stated above, FOIL Request 3 was for "records pertaining to religious accommodation requests either by employees or students."

In response to FOIL Request 3, Respondents provided the affidavit of the RAO of KCC which asserted that a further search of the requested records would be unduly burdensome. After reviewing the affidavit, the Court determined Respondents' response to FOIL Request 3 was sufficient.

Petitioner's motion to renew based on the Second Department case. Petitioner has failed to show that there has been made "that there is a change in the law that would change the prior determination." *Terrani*, 2019 WL 2648073 at *1.

Motion to Reargue Attorneys' Fees

Petitioner moves to renew and reargue this Court's denial of its application for fees, Petitioner argues that the Court applied the wrong standard in denying its request for attorneys' fees and "it should have been awarded attorney's fees, as it substantially prevailed in obtaining many of the records requested, and the Respondent did not meet its burden of proving that it had a 'reasonable basis' for denying all three category of records, each of which a substantial production has already been made." Petitioner argues that the Court's decision was "based on an outdated statute and outdated case law."

The Court grants the motion to reargue. POL § 89(4)(c)(ii) provides that the court "(i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access."

Accordingly, to satisfy the requirements entitling Petitioner to attorneys' fees, Petitioner must show that it substantially prevailed and the agency had no reasonable basis for denial. A petitioner substantially prevails "when respondents, during the pendency of this proceeding, disclosed the records sought in the FOIL request." *Dioso Faustino Freedom of Info. Law Request v. New York City*, 191 AD3d 504, 504 (1st Dept 2021).

Petitioner contends that it was "granted two of its three records requests, and received substantial documents from Respondent, [and] Petitioner has clearly 'substantially prevailed.'" Petitioner is referring to this Court's June 22, 2020 order that (1) directed Respondents to produce the employee complaints that were subject to the internal investigation by KCC in redacted form and to produce the requested records as they relate to Mr. Goldstein's SDHR proceeding (in response to FOIL Request 1) and (2) ordered Respondents to compile documents in response to FOIL Request 2 and a log identifying the PII of students for this Court to review *in camera*. Petitioner claims that Respondents thereafter provided Petitioner hundreds of pages of documents.

Respondents do not dispute that Petitioners' claim that it "substantially prevailed" under POL § 89(4)(c); however, Respondents argue that they had a reasonable basis for denying access to the requested documents that were later produced.

The Court now turns to the question of whether Respondents had a reasonable basis for denying access to the requested document that was later produced.

"As for whether a reasonable basis exist[s] for denying [a] petitioner access to the [agency records], a relevant issue 'is whether the agency reasonably claimed the records were exempt from disclosure under Public Officers Law § 87 (2), [and] the denial may still have been reasonable even if the records are ultimately deemed not to be exempt.'" *Matter of Utility Rate Analysis Consultants (URAC) Corp. v Public Serv. Commn. of the State of NY*, 171 AD3d at 1280-1281 (3d Dept 2019).

Petitioner contends that Respondents did not have a reasonable basis for denying its FOIL requests initially.

Respondents, in turn, argue that they had a reasonable basis for denying FOIL Request 1 which sought documents related to employee complaints to the SDHR and documents related to the internal employee complaints to KCC. Respondents contend that they denied access to the requested SDHR documents “because, at the time of the FOIL request and denial of the administrative appeal, the SDHR investigation was ongoing; the investigation had concluded by the time of the instant action.” Respondents note that the Court held, “As the SDHR proceeding is now completed, there can no longer be any interference with the investigation and Respondents are directed to produce the requested records as they relate to the SDHR matter.” Respondents argue that the Court “did not reject Respondents’ reason for denying access to the documents at the time the administrative decision was made but simply held that a change in facts made the invoked exemption no longer applicable.”

Respondents argue that KCC’s position that the internal employee complaints that had been the subject to the internal investigation of KCC and subsequent Jackson Lewis’ investigation should be withheld based on the law enforcement exemption was “reasonable” even though the Court held that exemption did not apply. Respondents argue that “simply because a court rejects an agency’s rational for withholding the documents, that rational may, nonetheless be reasonable basis for denying access.” Respondents argue “[t]hat is the situation here” where “KCC was investigating whether any policies were violated, and subsequently Jackson Lewis is seeking to determine if any employees violated CUNY/KCC policies, or federal, state, or local laws” and the employees potentially faced disciplinary actions as a result of the investigations. Respondents further argue that in the *Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 75-76 (2017), the Court of Appeal determined that the State Department of Education’s audit was a “law enforcement investigation.” Respondents argue, “Given these facts and precedent, Respondents’ denial was reasonable, particularly because upon information and belief, KCC had no prior experience where records from an independent law firm’s investigation had been the subject of a FOIL request.”

Respondents further argue that they had reasonable basis for denying FOIL Request 2 for student complaints. Respondents argue, “Though these records were ultimately disclosed, contrary to the Petitioner’s claim (Pet. Mem. at 13), the Court never ruled on whether disclosure was required, and Respondents concern that disclosure of the records would violate the Federal Family Educational Rights and Privacy Act (FERPA) was reasonable.” Respondents argue that at the time that they denied the request, there was caselaw that interpreted what constitutes an “educational record” under FERPA broadly. Respondents acknowledge that in response to an identical FOIL request to Brooklyn College, Kings County Judge Sweeney determined that the requested student complaints regarding anti-Semitism and anti-Zionism did not fall within the definition of “education records” under FERPA. However, Respondents contend that Judge Sweeney’s decision was not issued until May 2020, and did not exist at the time Respondents denied the request in this matter. Respondents further contend that there is caselaw that applies a broader definition of “educational record.” Respondents argue, “Given that educational records have been interpreted broadly in the past, Respondents had a reasonable basis for denying disclosure.”

The Court finds Respondents argue had a reasonable basis for denying access to the requested documents that were later produced. Respondents had a reasonable basis for denying access to the SDHR documents relating to Mr. Goldstein because the investigation had not yet been completed at the time of the initial denial. Respondents had a reasonable basis for denying the documents relating to the internal investigation and student complaints in light of the lack of clear precedence on the issues at the time of the denial.

Motion Sequence 3

Petitioner claims that Respondents failed to comply with this Court's order that Respondents were to produce all responsive documents to FOIL Request 3. Specifically, Petitioner claims that Respondents did not produce responsive documents related to KCC Professor Lax, whose claims of anti-Semitism and Anti-Zionism were the subject of media attention. Petitioner further claims that in *Lax v. City Univ. of N.Y.*, 16-CV-799 (LDH) (VMS) (E.D.N.Y. Oct. 21, 2020) ("the Lax Decision"), the federal court stated that KCC Professor Lax had filed an employment discrimination claim with the EEOC on August 4, 2015, and had filed other internal complaints of discrimination with CUNY prior to filing his EEOC claim. Petitioner claims that "[a]t the very least, KCC should have provided the Petitioner, The Jewish Press, with the EEOC file relating to Professor Lax" but rather "produced a certification stating that all responsive documents have been provided."

Respondents oppose the motion. Respondents' counsel contend that after Petitioner's counsel forwarded the Lax Decision, the RAO conducted a diligent search for the requested documents which included "(1) her own search for the records on the KCC campus; (2) conferring with a senior attorney in the Office of the General Counsel of CUNY; (3) conferring with employees in the Central Office of CUNY; and (4) conferring with the attorney that handles the EEOC cases for KCC, and her predecessor, who had the position in August of 2015." Respondents state that "the RAO was not able to locate the August 4, 2015 Complaint or any other complaints by Jeffrey Lax during the relevant time period." Respondents contend that since they have certified that they conducted a diligent search and were unable to locate the requested documents, the Court should deny Petitioner's motion.

Petitioner argues, *inter alia*, that Respondents' counsel's affirmation "does not offer any evidence that the subject documents do not exist, rather it essentially provides an attorney affirmation claiming that Respondent cannot find it," and "is also devoid of any evidence that Respondent conducted a 'diligent search.'" Petitioner argues that "at the very least it is entitled to an evidentiary hearing to determine the scope of the purported search."

"When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to 'certify that it does not have possession of [a requested] record or that such record cannot be found after a diligent search.'" *Matter of Rattley v New York City Police Dep't*, 96 NY2d 873, 875 (1st Dept 2001). "Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required." *Id.* at 875. An affirmation from counsel stating that certain documents could not be found despite a "thorough and diligent search" is sufficient and satisfies POL § 89 (3). *Id.*

Here, Respondents' counsel's certification that the RAO performed a diligent search and were unable to locate the requested documents relating to Professor Lax is sufficient and satisfies POL § 89 (3).

Wherefore it is hereby

ORDERED that the portion of Motion Sequence 2 that seeks leave to reargue the Court's denial of attorneys' fees, and upon reargument, Petitioner's application for attorneys' fees is denied; and it is further

ORDERED that the portion of Motion Sequence 2 that seeks to renew this Court's decision concerning FOIL Request 3 is denied; and it is further

ORDERED that Motion Sequence 3 is denied; and it is further

ORDERED that the proceeding is dismissed and the Clerk shall enter judgment accordingly.

All other relief requested is denied.

Dated: JUNE 2 2021



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION